

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ABDULLAH GLEN LOVELACE,

Defendant-Appellant.

UNPUBLISHED

October 12, 2006

No. 262377

Wayne Circuit Court

LC No. 04-012256-01

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree home invasion, MCL 750.110(a)2, assault with intent to rob while armed, MCL 750.89, armed robbery, MCL 750.529, assault with a dangerous weapon (felonious assault), MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to 9 to 20 years' imprisonment for the first-degree home invasion conviction, 9 to 15 years' imprisonment for the assault with intent to rob while armed conviction, 9 to 15 years' imprisonment for the armed robbery conviction, two to four years' imprisonment for the felonious assault conviction, and two years' imprisonment for the felony-firearm conviction. Because defendant's assault with intent to rob while armed conviction violates double jeopardy, we vacate his assault with intent to rob while armed conviction and sentence, but, because the trial court's admission of the voice identification evidence did not violate defendant's due process rights, we affirm in all other respects.

On appeal, defendant first argues that his felonious assault and assault with intent to rob convictions violated double jeopardy. This Court reviews an unpreserved double jeopardy challenge for plain error. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). Both the federal and state constitutions protect a defendant from being placed in jeopardy twice for the same offense. US Const, Am V; Const 1963, art 1, § 15. The test to determine whether multiple punishments violate both the federal and Michigan double jeopardy clauses is one of legislative intent. *People v Denio*, 454 Mich 691, 707; 564 NW2d 13 (1997). Double jeopardy is violated under the federal constitution if a defendant is punished for both a greater and lesser included offense. *Id.*, citing *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932). Under the Michigan test, Michigan courts use "traditional means to determine the intent of the legislature, such as the subject, language, and history of the statutes." *Denio*, *supra* at 708.

Regarding the convictions at issue, felonious assault and assault with intent to rob while armed are necessarily included lesser offenses of armed robbery.¹ *People v Yarbrough*, 107 Mich App 332, 335-336; 309 NW2d 602 (1981); *People v Johnson*, 90 Mich App 415, 421; 282 NW2d 340 (1979). Further, *Yarbrough* instructed that “an assault should be punished as an offense separate from armed robbery only where it can clearly be established that the offenses occurred at separate times” because the legislature did not intend to punish these offenses separately. *Yarbrough, supra* at 336. But “double jeopardy does not apply to crimes committed against different victims, even if the crimes occurred during the same criminal transaction . . .” *People v Hall*, 249 Mich App 262, 273; 643 NW2d 253, remanded on other grounds 467 Mich 888 (2002).

While holding a gun, defendant pulled Angelo Pacheco out of bed, forced him to kneel on the floor, threatened to kill him, kicked him, tied his legs and arms together, and stole money and personal items in Angelo’s presence. Angelo testified that he was frightened. Thus, the elements of armed robbery and the underlying felony, assault with intent to rob while armed, were satisfied with respect to Angelo. While Angelo was enduring this attack, defendant’s accomplice entered Irena Pacheco’s room, dragged her by her hair, struck her head with a gun, and asked Irena where she kept her jewelry, after which defendant, who had a gun, tied Irena’s legs and arms together and threatened her. Irena testified that she was frightened.² Thus, the elements of felonious assault and assault with intent to rob while armed were satisfied with respect to Irena.

The felony information, the trial court’s jury instructions, and the verdict form indicate that Angelo was the victim of the armed robbery charge and Irena was the victim of the felonious assault charge. Even though the prosecution stated that the armed robbery was committed against both Irena and Angelo, it is clear that defendant’s armed robbery conviction pertained only to Angelo and his felonious assault conviction pertained only to Irena. Although the felonious assault of Irena occurred simultaneously with the armed robbery of Angelo, the double

¹ The elements of armed robbery are: “(1) an assault, (2) a felonious taking of property from the victim’s person or presence, (3) while a victim is armed with a weapon described in the statute.” *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). The elements of felonious assault are: “(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The elements of assault with intent to rob while armed are: “(1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant’s being armed.” *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003).

² The prosecution argues that defendant entered Irena’s room and dragged her into Angelo’s room, however, it appears from the record that defendant was in Angelo’s room and another individual dragged Irena into Angelo’s room. However, given that defendant tied Irena with Angelo and robbed the house with the other individual, defendant is liable as an aider and abettor for any actions the other individual took against Irena in this case. See *People v Robinson*, 475 Mich 1, 9 n 17; 715 NW 2d 44 (2006) (an aider and abettor is one who helps, assists, or facilitates the commission of a crime, promotes the accomplishment thereof, helps in advancing or bringing it about, or encourages, counsels, or incites as to its commission).

jeopardy protection is inapplicable because the crimes were committed against different victims. *Hall, supra* at 273.

Regarding defendant's assault with intent to rob while armed and armed robbery convictions, the felony information indicates that Angelo and Irena were the victims of the assault with intent to rob while armed charge, while the trial court's jury instructions and verdict form indicate that either Angelo or Irena was the victim of this act. Further, when the clerk questioned the jury whether it had found defendant guilty of assault with intent to rob while armed regarding Angelo and Irena, the foreman only answered that defendant was guilty. "When a jury's verdict is uncertain, a defendant may be entitled to appropriate relief." *People v Ullah*, 216 Mich App 669, 683; 550 NW2d 568 (1996).

Given the verdict form and foreman's answer in conjunction with the felony information and the jury instructions, it is unclear whether the jury relied on defendant's actions with respect to Irena or Angelo in convicting defendant of assault with intent to rob while armed. If, in fact, the jury relied on defendant's actions with respect to Angelo for the assault with intent to rob while armed conviction, this would violate double jeopardy because assault with intent to rob while armed is a necessarily included lesser offense of and occurred contemporaneous to the armed robbery against Angelo. *Yarbrough, supra* at 335-336; *Johnson, supra* at 421. Because it is unclear whether the jury convicted defendant of assault with intent to rob while armed against Angelo in addition to defendant's armed robbery conviction, and a conviction under this scenario would violate double jeopardy, we must vacate defendant's conviction and sentence for assault with intent to rob while armed. See *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001) (remedy for double jeopardy violation involving multiple punishments is to affirm the greater offense and vacate the lower conviction).

Defendant next argues that the admission of identification evidence obtained after the police permitted Angelo to listen to a recording of defendant's voice was erroneous. This Court reviews the trial court's factual findings on a motion to suppress evidence for clear error. *People v Farrow*, 461 Mich 202, 208-209; 600 NW2d 634 (1999). However, this Court reviews de novo the trial court's conclusions of law and ultimate decision on a motion to suppress evidence. *People v Garvin*, 235 Mich App 90, 96-97; 597 NW2d 194 (1999).

"The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). For vocal identification evidence to be competent, "certainty must be shown to exist in the mind of the identifying witness by testimony that is positive and unequivocal." *People v Hayes*, 126 Mich App 721, 725; 337 NW2d 905 (1983). Further, the identification must be based on a peculiarity in the voice or on sufficient knowledge by the witness about the voice. *Id.*; *People v Bozzi*, 36 Mich App 15, 19; 193 NW2d 373 (1971).

Shortly after the crime, Angelo described defendant as a black male with a beard, short hair, dark complexion, and deep raspy voice. Within hours of the robbery, Angelo picked defendant's picture out of a group of several hundred mug shots. As part of their investigation, police called defendant's cellular phone so that Angelo could hear defendant's voice. Angelo recounted at the suppression hearing that he could not understand defendant's name on the recording. Angelo subsequently identified defendant's voice in a live lineup after hearing each

of the lineup participants speak a phrase the perpetrator uttered the night of the robbery. Even though police asked defendant to identify only one recording, Angelo testified that he based his live identification entirely on his encounter with defendant during the robbery and was in no way influenced by the voicemail recording he heard.

Our evaluation of the totality the circumstances in this case reveals that the voice identification procedure was not unduly suggestive. Angelo specifically described the perpetrator's voice as deep and raspy and stated that defendant spoke to him frequently during the robbery. The evidence shows that Angelo positively and unequivocally identified defendant, and that this identification did not result from impermissibly suggestive conduct by the police. *Hayes, supra* at 725; *Hornsby, supra* at 466. And, Angelo possessed sufficient knowledge of a peculiarity in defendant's voice on which to base his identification. *Bozzi, supra* at 19. The trial court did not err in admitting the vocal identification evidence.

Also, the alleged voice identification violation involves a trial error, rather than a structural error because it relates to the propriety of the admission of Angelo's testimony with respect to his pretrial voice identification of defendant and is therefore subject to harmless error analysis. *People v Anderson (After Remand)*, 446 Mich 392, 405; 521 NW2d 538 (1994). Angelo indicated that he had a clear look at defendant the night of the robbery and was subsequently able to identify defendant from a group of several hundred mug shots and at a lineup. Even if the voice identification resulted from impermissibly suggestive conduct by the police, any error that resulted was harmless beyond a reasonable doubt.

Finally, defendant argues that he should be resentenced because the trial court erroneously assessed points for Offense Variable 12 (OV 12) and because his sentence was unconstitutionally enhanced by the trial court regarding OV 3, OV 4, and OV 12. "[I]f the defendant failed to raise the scoring error at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the Court of Appeals, and the defendant's sentence is within the appropriate guidelines range, the defendant cannot raise the error on appeal" *People v Francisco*, 474 Mich 82, 91 n 8; 711 NW2d 44 (2006), citing *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). However, "a sentence that is outside the appropriate guidelines sentence range, for whatever reason, is appealable regardless of whether the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand." *Kimble, supra* at 310. Here, defendant claims there was a scoring error, but defendant did not raise this issue at sentencing, in a proper motion for resentencing, or in a motion for remand filed in this Court. Therefore, we must consider whether defendant's sentence is within the appropriate guidelines range to determine if this issue is appealable.

When imposing a sentence, the trial court must apply the appropriate guideline scoring range. MCL 769.34(2); *People v Hegwood*, 465 Mich 432, 438-440; 636 NW2d 127 (2001). A trial court's sentence may be invalid if it is based on a "misconception of law" or "inaccurate information." MCL 769.34(10); *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). Regarding OV 12, the trial court incorrectly assessed 25 points. In calculating OV 12, contemporaneous felonious criminal acts, MCL 777.42(1)(a) provides that a court must assess 25 points if "three or more contemporaneous felonious criminal acts involving crimes against a person were committed." MCL 777.42(2)(a) provides that "[a] felonious criminal act is contemporaneous if both of the following exist: (i) the criminal act occurred within 24 hours of

the sentencing offense, and (ii) the criminal act has not and will not result in a separate conviction.”

The trial court scored 25 points for OV 12 regarding the armed robbery conviction because “there were three or four different things besides felony[-]firearm” Because it appears that the only basis for the scoring of OV 12 was defendant’s contemporaneous felony convictions, the score violated MCL 777.42(2)(a)(ii) and the trial court should not have assessed any points for OV 12. A score of zero points for OV 12 would change defendant’s point total from 75 to 50 points and reduce defendant’s guidelines score from 108 to 180 months to 81 to 135 months as provided in MCL 777.62.

The trial court sentenced defendant to a minimum of 108 months’ imprisonment for his armed robbery conviction based defendant’s sentence on the incorrect range of 108 to 180 months. This sentence still falls within the correct guidelines range of 81 to 135 months. In *Francisco*, the Supreme Court held that where a scoring error altered the appropriate guidelines range and the defendant had preserved the issue at sentencing, the defendant was entitled to resentencing even though his sentence still fell within the appropriate guidelines range when the score was corrected. *Francisco*, *supra* at 89-92. However, *Francisco* instructs that a defendant who fails to properly preserve a scoring error under these circumstances is precluded from raising this issue on appeal. *Id.* at 91 n 8. In the instant case, although a scoring error altered defendant’s appropriate guidelines range, defendant failed to preserve this issue. Therefore, defendant is precluded from raising this issue on appeal and we are specifically required to affirm defendant’s sentence without further review. *Id.* at 91 n 8; *Kimble*, *supra* at 310-311.

Regarding defendant’s score for OV 3 and OV 4, the trial court assessed 10 points for OV 3 (for bodily injury to a victim requiring medical treatment) and 10 points for OV 4 (for a serious psychological injury to a victim requiring professional treatment). MCL 777.33(1)(d); MCL 777.34(1)(a); *People v Houston*, 473 Mich 399, 407; 702 NW2d 530 (2005); *People v Wilkens*, 267 Mich App 728, 740; 705 NW2d 728 (2005). Defendant argues that these scores are erroneous because a jury did not find proof beyond a reasonable doubt concerning the scoring factors for OV 3, OV 4, as well as OV 12, which enhanced his minimum sentence. We review this unpreserved sentencing challenge for plain error. *Kimble*, *supra* at 312, citing *Carines*, *supra* at 763.

It is a violation of the Sixth Amendment for a trial court to increase a defendant’s sentence beyond the maximum sentence permitted by law on the basis of facts found by the court rather than the jury. US Const, Am VI; *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, Michigan’s sentencing scheme is unaffected by *Blakely* because Michigan uses an indeterminate sentencing scheme in which the trial court sets the minimum sentence but can never exceed the statutory maximum sentence. *People v Claypool*, 470 Mich 715, 730 n 14 (Taylor, J), 732 (Corrigan, CJ), 741 (Cavanaugh, J), 744 n 1 (Young, J); 684 NW2d 278 (2004), *aff’d* *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Thus, “[a]s long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury’s verdict.” *Drohan*, *supra* at 164.

Here, the maximum sentence for an armed robbery conviction is life imprisonment. MCL 750.529; *People v Hoffman*, 205 Mich App 1, 17; 518 NW2d 817 (1994). Pursuant to the

scoring of OV 3 and OV 4 for a victim's physical and psychological injuries,³ which a jury did not find beyond a reasonable doubt in this case, the trial court sentenced defendant to 108 months' imprisonment. Nonetheless, even though the jury did not find beyond a reasonable doubt physical or psychological injuries to the victims requiring treatment, defendant's sentence was not erroneous because the sentence was within the statutory maximum. *Drohan, supra* at 164.

Moreover, "[s]coring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Angelo explained that defendant entered his room, pulled him out of bed, and struck his head with a gun. Irena stated that a man with a mask entered her room, dragged her by the hair to Angelo's room, and struck her head with a gun. Angelo and Irena were then tied facedown, with their hands behind their backs and feet up in the air. Both testified they were frightened. Thus, there was evidence in the record suggesting that the victims incurred bodily injuries requiring medical treatment and serious psychological injuries requiring professional treatment as required for the assessment of ten points for both OV 3 and OV 4. Defendant has failed to establish that there was plain error affecting his substantial rights. *Carines, supra* at 763-764.

We vacate defendant's assault with intent to rob while armed conviction and sentence, but affirm in all other respects. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Patrick M. Meter
/s/ Pat M. Donofrio

³ As noted above, the scoring of OV 12 did not erroneously affect defendant's sentence.